STATE OF MICHIGAN

IN THE SUPREME COURT

ANILA MUCI,

Plaintiff-Appellee,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a foreign corporation,

Defendant-Appellant.

Supreme Court No. 129388

Court of Appeals No. 251438

Wayne Circuit Court
No. 03-304534-NF

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129388

AMICUS CURIAE BRIEF BY MICHIGAN TRIAL LAWYERS ASSOCIATION

and

PROOF OF SERVICE

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Introduction

> *"Lawsuits are not activities to generate fees, games to be won or a theater to entertain. Lawsuits are searches for the truth of who did what and who is to be accountable for the consequences. Given the complexities of human affairs, the truth cannot always be found but the fair search for it is why courts, lawyers and lawsuits exist. When it is found, the truth must be revered and one answer to the question, "What is Truth?" must always be 'What is expected,' which means that when it is known, the truth must always be spoken.*
>
> *When the truth is concealed or deliberately distorted, the reaction must be outrage. Anything less accepts dishonesty and by accepting it encourages it. That is why 'courts have never been inclined to condone or reward those who choose to perjure themselves.' ....Reverence for the truth is an essential component of fairness. If the public ever comes to believe that the courts do not abhor dishonesty, they will not accept the courts' decisions as fair and will not be willing to submit their disputes to them."*

Traxler v Ford Motor Co, 227 Mich App 276,300 n 1; 576 NW 2d 398 (1998).

Defendant is asking this Court to allow completely unrestricted use by the insurance industry of a small cadre of professional witnesses who provide largely preordained opinions in exchange for a handsome fee. The cottage industry that has developed to provide these "opinions" should not be dignified with any assumption the process has any integrity. At the core of this case is the extent to which this Court will uphold the honor of the judicial process.

I.

PHYSICAL OR MENTAL EXAMINATIONS CONDUCTED BY PHYSICIANS AT THE REQUEST OF PARTIES OPPOSING CLAIMS ARE NOT "INDEPENDENT;" ARE ADVERSARIAL BY THEIR VERY NATURE, AND ARE INHERENTLY BIASED.

The public, lawyers for litigants and experienced judges are all aware of the burlesque of the so called "independent medical examination." This institutionalized charade is what led lawyers representing policyholders to conduct a seminar on how to restore public confidence in the judicial system and bring protections to legitimately injured persons who are asking for nothing more than benefits from contracts of insurance they purchased, or reasonable compensation for injuries they suffered and to which they are entitled.

In a patent attempt to appeal to this Court's perceived bias in favor of insurance companies and against victims, Defendant's brief launches an attack against the efforts to protect insureds from the widely known abuses of paid professional medical witnesses. Defendant labels the effort as a "preemptive attack ...on Defendant's ability to conduct fair and meaningful discovery." The Defendant also asks this Court to issue a definitive opinion to "end this type of nonsense." (Defendant's Application at p. 5, n.2).

Defendant's brief turns reality, and intellectual honesty, upside down. Defendant completely avoids acknowledging a system which all lawyers and the public are aware is utterly lacking in integrity. It is the "nonsense" of the misnomered "independent medical examination" that this Court needs to put the reins on, not the efforts to restore integrity to the judicial process.

The term "independent medical examination" is fostered by the cottage industry that

benefits from having a deceptive name associated with its commercial venture. And there should be no mistaking the commercial nature of insurance examinations: The use of "examiners" has developed into a multimillion dollar industry for unprincipled "physicians" who earn more money as experts testifying against insureds and injured victims than actually practicing medicine.[1] Only through a perversion of the true definition of the term can examinations like the one at issue in this case be associated with the word "independent."

Without reference to a dictionary, a Court of Appeals panel (including Judge, now Justice, Robert P. Young Jr.) in *Kloberdanz v United States Fidelity and Guaranty Ins Co,* 1997 Mich App Lexis 782 (copy attached as Exhibit 2) wrote:

> We acknowledge that defendant's medical examinations were not 'independent' because they were performed by doctors selected and paid for by defendant and that the trial court incorrectly indicated in front of the jury that 'the statute' [MCLA 500.3151; MSA 24.13151] reads 'independent medical examinations' when the statute in fact reads 'medical examinations.'

Reference to a dictionary only solidifies this inherently logical conclusion by the Court of Appeals panel. Webster's Third New International Dictionary defines independent as "being or acting free of the influence of something else; not looking to others for one's opinions or for the guidance of one's conduct; not biased by others; acting or thinking freely or disposed to act or think freely."

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[1] Of some significance to the issues in this case is *Austin v State Farm*, 2006 Mich App LEXIS 6 (unpublished, copy attached as Exhibit 1). In that case, one of the "usual suspects" was ordered to provide information as to how often she had performed expert services; the income she had earned as an expert witness in the prior three years, and the percentage of her practice that was devoted to serving as an expert witness. The witness chose to be stricken as an expert rather than comply with the order.

Even if one sets aside the illicit motivation caused by the extent of compensation the cadre earns from examinations, the impact of who is paying for the examination cannot be understated. Behavioral science establishes that the opinion of an examiner is inappropriately influenced by financial reward. For example, studies of psychiatric drugs by researchers with a financial conflict of interest (receiving speaking fees, owning stock, or being employed by the manufacturer) were found to be nearly five times more likely to find "benefits" in taking the drugs as studies by researchers who don't receive money from the industry. Perlis, Perlis, Wu, Hwang, Joseph and Nierenberg, *Industry Sponsorship and Financial Conflict of Interest in the Reporting of Clinical Trials in Psychiatry*, American Journal of Psychiatry, Oct. 2005, 1957-1960.

Studies have established that professionals, including doctors, experience "cognitive" or "psychological" bias, that is they will be "subjectively biased in favor of their benefactor." Bazerman, Malhotra, *Economics Wins, Psychology Loses, and Society Pays,* Harvard Business School, Harvard University (Exhibit 3). Moreover, disclosure of the conflict of interest does not solve the problem. In fact , disclosure could actually increase self-serving bias, as those who make disclosures feel that they have met their obligations and feel more free to engage in self-serving behavior. Id, citing Cain, D., G. Lowenstein and D. Moore (2005). *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest.* Journal of Legal Studies (in press).

Several courts have recognized the danger of the paid professional witness:

> ". . . The financial advantage which accrues to an expert witness in a particular case can extend beyond the remuneration he receives for testifying in that case. One way of effectively combating testimony of a professional expert (or for that matter any expert) is to show that the witness is biased.

> Like most business persons, many expert witnesses strive to keep their customers happy, especially if they have been well compensated for their previous services." *Wrobleski v deLara*, 708 A2d 1086, 1092 (Md Ct Spec App 1988).

Demonstrating a pattern of compensation in cases of a similar nature certainly raises the inference of the possibility that the witness slants his testimony so as to be hired in future cases. *Collins v Wayne Corp*, 621 F 2d 777 (5th Cir, 1980).

Whether the issue is deliberate slanting of testimony, or the more subtle psychological effects revealed in studies, the overriding principle is that physical or mental examinations like the one at issue in this case are an adversarial process fraught with built in bias and motivation to slant testimony. Procedures must be in place to minimize the gamesmanship abhorred in *Traxler* and enhance the truth seeking process our justice system demands. See also, *Allstate v Boecher*, 733 So 2d 993, 998 (Fl Sup Ct, 1999) (imposing certain conditions to avoid "thwarting the truth seeking function of the trial process [or] undermining the ... fairness of the trial.")

II.

A PROPER STATUTORY INTERPRETATION OF MCL 500.3151 NECESSARILY RESULTS IN THE CONCLUSION THAT THERE ARE RESTRICTIONS ON WHAT AN INSURER MAY REQUEST OF AN INSURED AND THAT A COURT IS THE FINAL ARBITER OF WHAT IS REASONABLE.

Significantly, Defendant agrees there have to be *some restrictions* on the scope of an MCL 500.3151 examination. Defendant admits at page 7 of its brief that MCL 500.3151 "does not provide for court ordered conditions if the *insurer's request was reasonable*." Defendant offers no citation to authority for this particular restriction of "reasonableness." That being said, the determination of what is "reasonable" is never the

exclusive province of one party or the other. Ultimately, courts are the final arbiters of reasonableness.

MCL 500.3151 does ***not*** refer to the ability of an insurer to unilaterally select the physician to whom a person making a claim must submit for examination. Had the Legislature chosen to include that right, it clearly would have done so. The more reasonable interpretation of this statutory provision is that, as under private insurance contracts, the insurer has the right to require medical verification of injury.

For example, privately supplied disability policies routinely condition payment of benefits upon a disability claimant being under the regular treatment of a physician. See. exemplar insurance policy, attached as Exhibit 4. Thus, an insurer who is being requested to pay wage loss or attendant care benefits may require the insured to "submit to mental or physical examination by physicians." The second clause of MCL 500.3151 provides the vehicle for an insurer to avail itself of the right to include this provision in its contracts. This interpretation is consistent with MCL 500.3158(2) which provides that a physician or other medical facility who provides such an examination must provide information upon request.

The above interpretation is also consistent with MCL 500.3159. This provision, which has language similar to the language of MCR 2.311, allows for an insurer to conduct discovery concerning the injured person's "history, condition, treatment and dates and costs of treatment." If MCL 500.3151 grants the unconditional rights alluded to by Defendant, MCL 500.3159 is entirely superfluous and has no meaning.

Defendant's argument seeks to graft into the statute two clauses the legislature did not choose to include. First, Defendant makes the argument that the legislature intended that a trial court may not impose conditions at issue in this case "without a particularized

showing that they are warranted by the past conduct of the proposed examiner." Defendant's brief at introductory (unnumbered) page 2. Second, Defendant argues MCL 500.3151 confers on no fault insurers "an unconditional right" to have a claimant examined by "a doctor of the insurer's choice." *Id.* Defendant identifies no language in the statute which grants either of the two "rights" the Defendant claims.

Common sense, and fundamental rights, preclude a finding there is an "unconditional" right to conduct examinations unfettered by reasonable restrictions. Without a requirement for reasonable restrictions, there would be no ability to control, for example, the use of invasive tests or the application of duplicative radiation. Defendant is seeking the unfettered opportunity to perform whatever medical procedures it alone deems necessary for the purpose of processing a claim for benefits. Such unfettered control could pose health risks, inflict unnecessary pain, and impose no controls over what may be performed on an insured.[2]

For example, a treating physician may choose to prescribe physical therapy or medication prior to conducting a painful EMG or conduct radiographic or surgical examinations. A physician selected by an insurance company for purposes of testimony only may choose to perform an EMG or an arthroscopic examination prior to employing other mechanisms a treating physician would undertake.

It may seem like an extreme example that an examining physician would undertake an arthroscopic examination. The point is not whether this is an extreme example or not;

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[2] To the contrary, if an individual pursuant to MCL 500.3151 is requested to obtain treatment from a physician, only such treatment as is reasonably medically necessary will be performed.

it is what controls are in place to prevent it from happening.

What this Court may find a more realistic example is the extent to which an examining physician may undertake duplicative radiographic examinations not for the purpose of treatment but rather for the purpose of an insurer's evaluation of a claim. It is no longer questioned that common radiographic procedures pose a risk of cancer. See e.g. John W. Gofman, M.D.; Ph.D., *Radiation from Medical Procedures in the Pathogenesis of Cancer and Ischemic Heart Disease*; Berrington deGonzalez A. Darby S, *Risk of Cancer from Diagnostic X-rays: Estimates for the UK and 14 other Countries*, The Lancet, 2004 Jan 31; 363 (9406); 345-51. These studies, and others, while disagreeing as to the extent of danger, agree that the danger from radiation is cumulative and each exposure to x-rays or CAT scans increases the risk of cancer. No individual engaged in the simple contractual act of seeking insurance benefits should have to increase the danger to their lives unnecessarily. Yet, in the unrestricted insurance examination sought by Defendant, there would be no safeguard requiring alternative means of obtaining diagnostic information (i.e. obtaining copies of x-rays from treating physicians and hospitals).[3]

Since both parties agree that there must be some restriction on the examination, the only question is who gets to decide what is reasonable. Clearly, that power has to reside with the Court, not one of the parties who has a vested interest. This obvious conclusion is embodied within MCL 500.3159 and MCR 2.311, both of which grant to the ***Court*** in

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[3] Reasonable restrictions on the nature of the tests allowed to be performed not only protects the health and safety of the insured but also reduces the cost of the examination to the insurer and, ultimately, the cost of insurance to the public.

nearly identical language the ***duty*** to "specify the time, place, manner, *conditions and scope..*" of an examination.[4]

III.

AN ATTORNEY OR REPRESENTATIVE'S PRESENCE AT AN EXAMINATION IS HIGHLY BENEFICIAL TO THE CLAIMANT/INSURED AND, WITH PROPER SAFEGUARDS, WOULD NOT IN ANY WAY IMPAIR THE EFFECTIVENESS OF THE PROCEDURE FOR THE INSURANCE COMPANY.

At the point in time an insurer requests that its insured submit to an examination, the likelihood of an adversarial relationship exists.

> A PIP examination is a potential step in the direction of litigation. The insured is claiming an entitlement to continued benefits and the insurer is questioning the necessity for same. In order to continue receiving benefits, the insured must comply with the requirements of the insurance contract and (a statute). The insured is required to comply with a PIP examination in order to continue to receive the contractual benefits. The insured and the insurer are certainly not in agreement at this point.

US Security Ins Co v Cimino, 750 So 2d 697; 2000 Florida LEXIS 498.

See, also, Dyer v Trachtman, 470 Mich 45, 51; 679 NW2d 311 (2004)

In light of this adversarial setting, there are several factors which favor allowing an attorney to attend a compelled examination of his or her client.

> . . . Plaintiff's counsel in a civil case should have the right to attend a physical, or psychiatric, examination of his client in

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[4] MCR 2.311 states: "The ***order*** may be entered only on motion for good cause with notice to the person to be examined and to all parties. The order ***must*** specify the time, place, manner, conditions, and scope of the examination..."(Emphasis added)

MCL 500.3159 states: "The ***order*** may be made only on motion for good cause shown and upon notice to all persons having an interest, and ***shall*** specify the time, place, manner, conditions and scope of the discovery." (Emphasis added)

> several respects. First, there is a constitutional right to counsel in civil cases arising from the due process clause. We recognize that the right to counsel in civil cases is not co-extensive with the right to counsel in criminal prosecutions, but in the area of compelled examinations we see no reason to draw a distinction. Second, counsel may observe shortcomings and improprieties in an examination which can be brought out during cross-examination at either a civil or criminal trial. Third, although observation may be the primary role of counsel in both criminal and civil cases, counsel may on occasion properly object to questions concerning privileged information. There are privileges which may be invaded in civil as well as in criminal cases.

Langfeldt-Haaland v Saupe Enters., 768 P 2d 1144, 1146 (Al Sup Ct 1999).

There are other strong policy reasons favoring allowing attorneys to be present. Because such examinations are conducted by a physician of the insurer's choice, the physician is seen by the insured as an adversary who is regularly aligned with the defense of claims. People are frequently anxious about exposing their bodies to examination by a stranger, a situation which is exacerbated in the compelled examination context where the examiner is associated with a hostile party. Thus, the insured's ability to have his or her attorney or other appropriate representative present during the procedure for purposes of protection, advice or comfort, can actually enhance the process.

Clearly, the presence of an attorney or representative must be such as to not interfere with a properly conducted examination. The potential for disruption, with no showing that disruption will occur, however, does not outweigh the benefit of having an attorney present. In a comparable situation, the law allows counsel to be present at examinations under oath and at depositions, although the potential for disruption exists. Despite this "potential" there is no dispute about the right of counsel to be present at the examination and there are remedies for the Court to impose on disruptive counsel. Similar

remedies could be imposed in the physical examination context.

Provided that counsel is not disruptive, there is no sound basis upon which counsel should be excluded. This is especially so given the adversarial nature of the proceeding and the inherent bias in the process.

IV.

THE BENEFITS OF PERMITTING VIDEOTAPING OF PHYSICAL OR MENTAL EXAMINATIONS FAR OUTWEIGH ANY POTENTIAL DETRIMENT.

Defendant asserts a condition allowing videotaping should not be permitted because "the presence of a videographer could influence the Plaintiff, even unconsciously, to exaggerate or diminish his reactions." Defendant's Brief at p. 21. There are several flaws with this argument.

First, it completely ignores the reality the proposed expert would likely be far more accurate, careful and thorough knowing the examination is being recorded. Ordinarily, much time is spent during cross-examination as to the amount of time the physician spent with the insured; what the actual examination consisted of; the degree to which range of motion tests were given/measured and other issues that are subjectively described by the physician. A video recording of the examination eliminates the need for much of that cross-examination.

Second, it is disingenuous to suggest that an insured who knows he or she is being examined by a physician for the insurance company would somehow be motivated to "exaggerate" by the presence of video equipment, but not the doctor's status as an adversary. In reality, it is far more likely that all concerned will be "on their best behavior" if they know they are on camera. Physicians doing these examinations for insurance

companies frequently offer their opinion that the subject of the examination exaggerated the complaints, did not give a "full effort" or is otherwise not a credible reporter. If there were a videotape of the manner in which the examinee reported the symptomatology and/or responded to the examiner's requests, the fact finder would be able to conclude on its own whether or not the examinee was credible.

Allowing a judge or jury as fact finder to view the examination and make its own decision as to the credibility of the participants is consistent with the way our legal system addresses credibility determinations. Specifically, appellate courts are reluctant to review credibility decisions of fact finders because of their ability to observe the demeanor of witnesses. See, e.g., *Huffer v Porter*, 297 Mich 555; 298 NW 279 (1941); *People v Smith* 80 Mich App 106; 263 NW2d 306 (1977). In fact, it is the very ability to observe a witness' demeanor that results in the taking of most trial and some discovery depositions by video.

In a related area, any experienced products liability attorney demands that if a product is being inspected/tested, the procedure must be videotaped. It is inconceivable that videotaping of such testing/inspecting would not be allowed. If videotaping of inanimate objects is the routine, logic would suggest that videotaping of the inspection of the human body would be mandatory. Just as an expert or a litigant would be careful during the testing/inspection of a product on video, a physician hired as an adversary would likewise be more careful. There simply is no good, substantial reason why videotaping should not be routinely allowed.[5]

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[5] A second argument offered by the Defendant is that a videotape would give "Plaintiffs an evidentiary tool unavailable to Defendant, who has not been privy to physical examinations made by either the treating physicians or retained experts." Defendant's brief at p. 21. This argument should carry little weight since a party in possession of evidence

Conclusion

Amicus Curiae Michigan Trial Lawyers Association requests that this Court deny the Defendant's Application for Leave to Appeal.

Respectfully submitted,

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has multiple advantages over the other side, who only has access through discovery mechanisms. For example, every party may meet extensively with his/her attorney prior to being cross-examined at a deposition or trial. An opposing party does not have that same opportunity to meet with the "witness;" the only opportunity is a deposition and cross examination.